85-1836

Supreme Court, U.S.
FILED
MAY 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

SABHI CHEHADE,

Petitioner,

v.

FRYDA SHEHADE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

ALBERT KORETZKY
DI MONTE & LIZAK
5201 N. Harlem Avenue
Chicago, IL 60656
(312) 775-9339
Attorneys for Petitioner

The Scheffer Press, Inc.—(312) 263-6850

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QUESTIONS PRESENTED FOR REVIEW

Whether petitioner was denied his constitutional right to due process and equal protection of the laws where, at a hearing instituted by respondent to set aside her husband's bona fide transfer for value of his property to his brother (petitioner), the transfer was set aside as a sham and affirmed on appeal without any evidence in the record.

Do the Due Process and Equal Protection clauses of the United States Constitution permit a lien against property to be adjudicated without a hearing?

LIST OF PARTIES

Sabhi Chehade was the respondent in the Circuit Court of Cook County, Illinois, and the appellant in the Appellate Court of Illinois, First District.

Fryda Shehade was the petitioner for dissolution of her marriage in the Circuit Court of Cook County, Illinois, and the appellee in the Appellate Court of Illinois, First District.

Mesbah Shehade was the respondent to the petition for dissolution of the marriage and was not a party to the appeal in the Appellate Court of Illinois, First District.

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No.

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SABHI CHEHADE,

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PETITION FOR A WRIT OF CERTIORARI
to the Appellate Court of Illinois,
First District

The petitioner, Sabhi Chehade, respectfully petitions this Court for the issuance of a Writ of Certiorari to review the judgment of the Appellate Court of Illinois, First District.

OPINIONS BELOW

The unreported order of the Circuit Court of Cook County, Illinois, is on page 1a of the Appendix. The initial opinion of the Appellate Court of Illinois, First District, is on page 39a of the Appendix. Its final opinion is reported at 137 Ill.App.3d 692, 484 N.E.2d 1253, 92 Ill.Dec. 398, and is on page 3a of the Appendix. The unreported order of the Illinois Supreme Court is on page 50a of the Appendix.

JURISDICTION

The final judgment of the Appellate Court of Illinois, Second District, was rendered on October 24, 1985. A timely petition for leave to appeal was denied by the Illinois Supreme Court on February 5, 1986, and this petition was filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XIV of the Constitution of the United States:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE VI of the Constitution of the State of Illinois:

> "Section 6. Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in the the Judicial District in which the Circuit Court is located . . . ."

ARTICLE I of the Constitution of the State of Illinois:

> "Section 2. No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

STATEMENT OF THE CASE

This case arises out of a proceeding by Fryda Shehade (Fryda) to dissolve her marriage with Mesbah Shehade (Mesbah).

On January 30, 1984, Fryda brought a petition against Sabhi Chehade (Sabhi) to set aside an assignment from Mesbah to Sabhi of articles of agreement on the ground that the assignment was colorable, illusory and without consideration and in fraud of her marital rights. Sabhi denied that the assignment was colorable or illusory or without consideration.

At the hearing of May 8, 1984, Fryda testified that Mesbah told Sabhi that Mesbah was going to transfer his property at 2867 N. Milwaukee, Chicago, Illinois, to his brothers and that he was going to leave Fryda without a penny.

Sabhi testified that he agreed to buy the building in installments; that the

price was $80,000 and the mortgage was $50,000; that he gave Mesbah a $2,750 deposit on March 5, 1983; that it was agreed that Sabhi would pay the installments when he had the money; that Mesbah wanted an additional amount as a down payment; that he gave Mesbah $7,254 worth of merchandise when the papers were signed on April 20, 1983; that he gave Mesbah a $6,000 check payable to his nephew, Sabri Shehade (Sabri), as Mesbah instructed; that he made additional payments, by check, of $3,367.72, $2,528, $2,000, $1,000, $1,000 and $1,000, plus a cash payment of $3,000, or a total of $29,899.72 by May 8, 1984.

Sabri testified that his uncle, Mesbah, owed him $20,000 which was paid by some $7,000 of general merchandise and two of Sabhi's checks of $6,000 and $5,000. After the $5,000 check bounced,

Sabhi paid him $5,000, $2,000 by check. On cross-examination he testified that he brought $20,000 into this country and that if he was asked to testify for his uncle, he would help him because he is family.

The trial court decided that the assignment was null and void and required Sabhi to account for rents collected by him. At the conclusion of the hearing, the trial court made this statement:

> "As to the assignment on April 20th as evidenced by the document which is designated Exhibit Two appended to the pleading, I think it strange that they would expect you to believe that a property which indisputedly valued at eighty thousand dollars was purchased with a down payment of two thousand seven hundred fifty dollars without the purchasers knowing or being held to know that the transaction contravened a court order or that there was some impropriety about it.
>
> "The payments testified to subsequently, the payees, the amounts, the dates testified to, all of which, all of these tend to support this Court's view that this was a sham transaction. It is palpably not at arm's

> length. And the Court can draw no inference from the testimony and the evidence adduced other than that the transaction was a rather shabby and crude attempt to evade this Court's order.
>
> "Accordingly, this Court declares void the transfer evidenced by the document dated April 20, 1983. With respect to the reimbursement for rents, an accounting should be made for all rents collected and I will rely on Counsel to prepare a repayment schedule to Mrs. Shehade. What she is going to do now that the property is where her beneficial interest has been restored to her is not before the Court so I do not intend to address myself to it."

The Appellate Court initially found insufficient evidence to support the trial court's finding that the transaction was colorable or illusory and reversed the judgment. On rehearing, the majority held that the trial court's finding was not against the manifest weight of the evidence and that it had full authority to declare the assignment void without a hearing to adjudicate Fryda's marital lien interest. A dissent concluded that the

evidence did not clearly and convincingly establish the transaction to be colorable or illusory and that Mesbah intended to retain ownership.

Sabhi filed a timely petition for leave to appeal with the Illinois Supreme Court raising the constitutional questions sought to be reviewed. These questions were raised on page 10 of the petition as follows:

> "I. THE MAJORITY ERRED IN SANCTIONING THE TRIAL COURT'S ARBITRARY REPUDIATION OF UNDISPUTED AND UNIMPEACHED EVIDENCE THAT NO COLORABLE OR ILLUSORY TRANSFER OCCURRED AND THEREBY NULLIFIED SABHI'S CONSTITUTIONAL RIGHTS OF APPEAL, DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.
>
> "Despite the undisputed documentary and testimonial evidence, the absence of any impeaching evidence and the uncomplicated nature of the case, the majority, in effect, holds that Illinois law permits a trial judge to ignore the entire record in deciding a case on the merits and that such an arbitrary decision cannot be reviewed on appeal because of the manifest weight of the evidence rule. Thus, the effect of the majority's decision

is to give a trial judge unlimited power and discretion . . . ."

"Acceptance of this perversion of the manifest weight of the evidence rule would make a dead letter of Section 5 of Article VI of the Illinois constitution which guarantees all litigants a right of review from final judgments and of Section 2 of Article I governing due process and equal protection of the laws."

The petition for leave to appeal was denied by the Illinois Supreme Court on February 5, 1986.

ARGUMENT

I

THERE WAS NO EVIDENCE THAT THE HUSBAND'S TRANSFER OF HIS PROPERTY TO HIS BROTHER SABHI WAS A SHAM TO DEFRAUD HIS WIFE. THE THE APPELLATE COURT INITIALLY SO HELD. SINCE ITS FINAL OPINION THAT THE TRANSFER WAS A SHAM IS NOT BASED ON EVIDENCE, SABHI WAS DENIED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

This Court has continually held that "a fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 99 L.Ed. 942, 75 S. Ct. 623 (1955).

"In depriving a person of life, liberty, or property, the essentials of due process are: 1) the existence of an appropriate tribunal; 2) inquiry into the merits of the question presented; 3)

notice of the purpose of the inquiry; 4) opportunity to appear in person or by counsel; 5) fair opportunity to be heard; and 6) judgment rendered in the record thus made." State in Interest of L.G.W., 638 P.2d 527, 528 (1981, Utah). (Emphasis added.)

Fryda presented no evidence of a colorable or illusory transfer. The only item of conflicting evidence mentioned in the majority opinion is that Fryda "heard Mesbah tell Sabhi, that he intended to 'give' everything to his brothers in order to deprive Fryda of any interest therein." (Appendix, at 29a.) This evidence is no proof of a fraudulent transfer. Both the majority and dissenting opinions agree that Mesbah was entitled to transfer his property for the sole purpose of defeating Fryda's marital rights in the property. Other than this testimony, there is no

conflict in the evidence. Moreover, there was never a finding at trial or appeal that no consideration was given.

The majority states that "the trial court essentially concluded that Mesbah had no intent to convey to Sabhi any present interest . . . , but instead planned to retain ownership . . . ." (Appendix at 27a.) But there is no evidence in the record to support such a conclusion.

In effect, the Appellate Court presumed that Sabhi had participated in a fraud. But fraud cannot be presumed and must be proved by clear and convincing evidence. Hofmann v. Hofmann, 94 Ill.2d 205, 445 N.E.2d 499, 506 (1983).

In its initial opinion, the Appellate Court unanimously decided "there is insufficient evidence to support the finding by the trial court that the

transaction here was merely colorable or illusory." (Appendix, at 47a.) The dissenting opinion pointed out that "Fryda did not present any evidence that would contradict or 'discredit' the testimony of Sabhi and his nephew." (Appendix, at 37a.)

The majority opinion states that "(w)ithout the testimony of Sabhi and his nephew, there was no clear proof that the payments from Sabhi to Mesbah were made in relation to Mesbah's interest in the property." (Appendix, at 29a.) But with or without their testimony, there is no evidence to establish any prima facie case. It appears that Sabhi was required by the majority to prove his innocence.

Hofmann v. Hofmann, 94 Ill.2d 205, 446 N.E.2d 499, 506 (1983), and O'Neill v. DeLaney, 92 Ill.App.3d 292, 415 N.E.2d 1260 (1980), place the burden of proof on the party attacking the conveyance. As the

dissent points out:

> "The setting aside of a conveyance is a harsh remedy in that it deprives one of the right of ownership of property, therefore, the burden is on the party attacking the conveyance to establish through clear and convincing evidence that the transfer was a sham." (Appendix, at 34a.)

The manifest weight of the evidence rule relied on by the majority applies only where there is conflicting evidence or a complex factual situation, neither of which were involved here. The rule can only be applied where there is evidence to be weighed to "determine the preponderance thereof." Schulenburg v. Signatrol, Inc., 37 Ill.2d 352, 226 N.E.2d 624, 626 (1967); Ross v. Steiner, 66 Ill.App.3d 567, 384 N.E.2d 398, 402 (1978). There was no evidence to be weighed in this case.

The Appellate Court's misinterpretation of the manifest weight of the evidence rule resulted in an unfair review of the record made in the trial court and in

a denial of due process and equal protection of the Illinois constitutional guaranty of the right of review.

II

SINCE SABHI'S PROPERTY WAS FORFEITED WITHOUT A HEARING AS TO THE VALUE OF FRYDA'S INCHOATE MARITAL LIEN, THE APPELLATE COURT DENIED SABHI'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

In Hofmann v. Hofmann, 94 Ill.2d 205, 446 N.E.2d 499, 502, 507 (1983), the Illinois Supreme Court affirmed the setting aside of a transfer in fraud of a spouse's marital rights only to the extent of the inchoate marital lien.

In Re Marriage of Pahlke, 120 Ill. App.3d 1009, 458 N.E.2d 1141 (1983), held that the Illinois Marriage and Dissolution of Marriage Act "does not give the court authority to distribute property until af-

ter the dissolution of marriage has been granted, (Ill.Rev.Stat.1981 ch. 40, par. 503. . . .)"

In the instant case, the trial court invalidated the transfer and forfeited Sabhi's property interest without any hearing as to the value of the inchoate marital lien even though, as between Mesbah and Sabhi, the transfer to Sabhi remained valid. That is, Sabhi was entitled to whatever interest Mesbah had in the property. If Mesbah had not made the transfer, he would have been entitled to a hearing as to the value of Fryda's inchoate marital lien and she could not have obtained title to the property.

There was no evidence as to the percentage or value of Fryda's inchoate marital lien that Fryda could receive upon entry of a judgment of dissolution of the marriage.

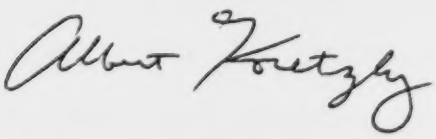
Under the Illinois Marriage and Dissolution of Marriage Act, Fryda had no vested interest in Mesbah's articles of agreement. Her interest in marital property could not "encumber that property so as to restrict its transfer, assignment or conveyance unless such title holder is specifically enjoined from making such transfer, assignment or conveyance." Ill. Rev. Stat., 1983, ch. 40 ¶503(e).

Thus, even if the restraining order had been in effect, her marital interest could only encumber the property but could not cause the transfer to be invalid. At most, she would have an inchoate lien the value of which would have to be determined by a judicial hearing. The Appellate Court, however, decided that Sabhi's interest in property for which he paid almost $30,000 could be forfeited without a hearing.

CONCLUSION

For these reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment of the Appellate Court of Illinois, First District, involving important questions of constitutional law which have not been, but should be, settled by this Court.

Respectfully submitted,



ALBERT KORETZKY

Di Monte & Lizak
5201 N. Harlem Avenue
Chicago, IL 60656
(312) 775-9339

Attorneys for Petitioner

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IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

IN RE THE MARRIAGE OF FRYDA CASTILLO SHEHADE,	)	
Plaintiff,	)	
v.	)	No. 82 D 20304
MESBAH M. SHEHADE,	)	
Defendant.	)	

ORDER

Comes on this cause on the amended petition for rule to show cause, to add additional parties and for other relief, and on the answer thereto, and the Court having heard the testimony of the Plaintiff and witness called by Sabhi Shehade, and the Court being advised in the premises,

It is Ordered: (1) Sabhi Shehadi and Devon Bank as trustee under trust 3972 are made Defendants herein. (2) A rule instanter is entered against Defendant

Mesbah Shehade, returnable instanter. He is found in contempt. The Sheriff shall take him into custody and hold him until further order of Court. (3) The assignment dated April 20, 1983 of Lot 33 in Block 7 in Henry Wisner's Subdivision of Lots 11 and 12 in Brand's Subdivision of the Northeast ¼ of Section 26, Twp. 40 N, Range 13 E of the 3rd Principal Meridian, CookCounty, Illinois, as evidenced and as attached to the petition, is held to be null and void and of no legal effect whatever. (4) Defendant Sabhi Shehadi shall forthwith account to Plaintiff for all rents collected by him by reason of his pretended ownership of said property. (5) The Court finds that there is no just reason to delay the enforcement of or appeal from this order. It is the Court's view that this is a final and appealable order.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NO. 84-1902

IN RE: THE MARRIAGE OF FRYDA SHEHADE,	)	FOURTH DIVISION OCTOBER 24, 1985
Petitioner,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY
vs.	)	
MESBAH SHEHADE,	)	
Respondent.	)	
**********	)	
FRYDA SHEHADE,	)	
Petitioner-Appellee,	)	
vs.	)	
SABHI CHEHADE,	)	HONORABLE AUBREY F. KAPLAN,
Respondent-Appellant.	)	PRESIDING.

JUSTICE LINN delivered the opinion of the court upon the allowance of the petition for rehearing:

Fryda Shehade (Fryda) filed a petition in the Cook County circuit court for dissolution of her marriage to Mesbah Shehade (Mesbah), distribution of their

marital estate, and custody of their child. During the pendency of the proceeding the trial court entered an order which enjoined Mesbah from transferring, encumbering, or otherwise disposing of any of the property which belonged either to Fryda individually or to Fryda and Mesbah jointly.

Thereafter Mesbah assigned to his brother, Sabhi Chehade (Sabhi), Mesbah's interest in an agreement for the purchase of certain property located in Chicago and held in a land trust. Mesbah had entered into the agreement for the purchase of the property during the pendency of the dissolution proceeding.

Roughly seven months after the assignment, the trial court entered an order which enjoined Mesbah from conveying, transferring, assigning, or otherwise dealing with the property

until further order of court. The order was entered pursuant to Fryda's motion therefor. Apparently neither Fryda nor the trial court was aware of Mesbah's assignment of the property to his brother at the time the order was entered.

After Fryda learned of the assignment, she filed with the trial court a petition for rule to show cause, to add additional parties, and for other relief. In the pleading, Fryda contended that Mesbah's assignment of his interest in the Chicago property to Sabhi constituted a fraud upon her right to and in the property, and that the assignment was colorable, illusory and a sham. As ultimately amended, Fryda's petition requested that the assignment be declared null and void that Sabhi be made an additional party defendant, and that he be directed to

reimburse her for all rents collected from the property since the trial court's order which enjoined Mesbah from assigning his interest in the property.

Sabhi answered Fryda's petition and denied that the transaction had been colorable, illusory, or a sham or fraud upon Fryda's interest. Following a hearing at which Fryda, Sabhi, and Sabri Shehade (a nephew of Mesbah and his brother Sabhi) testified, the trial court found that the transaction was a sham designed to deprive Fryda of her interest to and in the premises. The court held the assignment null and void and ordered Sabhi to account to Fryda for rents he had collected on the premises. The trial court later denied Sabhi's motion to reconsider its order. Sabhi appeals.

The parties raise the following

questions for our review:

1. Whether the trial court's determination that Mesbah's assignment of his interest in the property to Sabhi was a sham, illusory and colorable, was against the manifest weight of the evidence;

2. Whether the trial court acted beyond the scope of its authority under the Illinois Marriage and Dissolution of Marriage Act (Ill.Rev.Stat. 1983, ch. 40, pars. 101 et seq.) where it held the assignment null and void and ordered Sabhi to account to Fryda for rents collected upon the premises.

We affirm.

BACKGROUND:

The record reflects the following pertinent pleading and testamentary evidence.

According to Fryda's petition for

dissolution of marriage and other relief which was filed on October 13, 1982, Fryda and Mesbah were married on March 5, 1974; one child, age seven, was born of the marriage. Fryda claimed that during the course of the marriage, Mesbah acquired various assets which were marital assets, "notwithstanding their standing in the name of [Mesbah], any alias of [Mesbah], or any nominee on his behalf."

Mesbah's answer to the petition denied in material substance the allegations of the petition, and requested that the same be dismissed.

Roughly four months after her petition for dissolution was filed, Fryda presented to the court her emergency petition for injunctive and other relief. In it she alleged in substance that Mesbah had caused her physical abuse;

had attacked her automobile and caused it damage to the extent that it was inoperable; and that Mesbah had "bragged" to Fryda "that he was in the process of selling certain parcels of real estate acquired during the marriage, and that there would be nothing left for [Fryda] to obtain her share of in this case." Fryda further alleged that she therefore feared that Mesbah would waste, sell, convey, transfer, assign, hide, conceal, destroy, encumber or otherwise dissipate the marital estate of the parties unless he were restrained and enjoined from doing so during the pendency of the cause.

Based upon these allegations, as well as the arguments of both parties at a hearing upon the petition held on the day it was filed at which both Fryda and Mesbah were present, the trial court entered an order dated

February 10, 1983, which granted Fryda's petition. The trial court's order stated inter alia that "each of the parties is restrained and enjoined from wasting, selling, con- veying, hiding, transferring, concealing, damaging, destroying, encumbering or otherwise dealing with assets held in his or her name or alias, or in the name of another for the benefit of either party, pending further Order of Court."

Roughly a month and a half later, on March 31, and pursuant to Fryda's petition for a rule to show cause and other relief, the trial court entered an order which directed inter alia that a domestic violence order issue against Mesbah instanter. The agreed order of protest, filed the same day provided in relevant part that Mesbah was "restrained from transferring, en- cumbering, concealing, damaging or other-

wise disposing of any of [Fryda's] property or joint property of [Fryda and Mesbah]." The order stated an expiration date and time of March 31, 1984, at 4:00 p.m.

Thereafter, between April and September, 1983, the parties litigated matters pertaining to temporary custody of the minor child, temporary maintenance and child support, and attorney's fees. Temporary custody was awarded to Fryda in mid-July. In early September, Fryda filed an emergency petition for rule to show cause and other relief in which she alleged that Mesbah had exercised visitation with the parties' child on August 27, but had failed to return the child to Fryda's custody. She claimed that she had been informed and believed that Mesbah had removed the child from the State of Illinois and the United

States.

A rule was entered against Mesbah on the same day, made returnable on September 19, 1983. Mesbah failed to appear on the appointed day. His attorney of record motioned the court to withdraw as Mesbah's counsel; the affidavit in support of the motion stated in pertinent part that the attorney believed, "[u]pon information and belief, [that] [Mesbah] is not any longer living in the United States of America." An attachment order upon Mesbah was issued on September 19th. His attorney of record was also granted leave to withdraw on that date.

A month later, on November 16, Fryda petitioned the court to grant her leave to file her petition to add the Devon Bank as an additional party defendant, and to issue temporary restraining orders,

without notice and without bond for good cause shown, restraining the Bank and Mesbah from effecting the assignment, conveyance, sale or transfer of numerous specified bank accounts and of the interest in a certain land trust held by the Bank. The trial court granted the motion and entered the temporary restraining orders as requested. Fryda was also granted leave to file her petition to add Devon Bank as an additional party respondent.

A week later the trial court granted Fryda's motion to add Devon Bank. The trial court further converted its temporary restraining orders of November 16 into preliminary injunctions, issued without notice and without bond, pending further court order.

Two months later, on January 30, 1984, Fryda filed a peition for rule to show cause, to add an additional

party and for other relief. In it she alleged in pertinent substance that on April 20, 1983, Mesbah assigned his beneficial interest in the Devon land trust to his brother, Sabhi Chenade. A copy of the assignment was attached to the pleading. Fryda claimed that the assignment was in violation of the court's previous orders and constituted a fraud upon her right to and in said property, and was colorable, illusory, and a sham. Fryda further alleged that Sabhi knew of the court's orders which enjoined Mesbah from any assignment or other conveyance of such property. She requested inter alia that Sabhi be made an additional party respondent in the cause and that the April 20 assignment be set aside and declared null and void. The petition was later amended to request in addition that Sabhi be directed to reimburse Fryda for

all rents collected at the premises since November 16, 1983.

Sabhi's answer to the petition, filed March 7, 1984, denied that the assignment was a sham and denied any knowledge of the court's injunction against Mesbah to restrain his assignment of his interest in the land trust.

The trial court held its hearing on the matter on May 8, 1984. Fryda testified on her own behalf; Sabhi and his nephew testified in opposition.

Fryda testified that she knew her brother-in-law Sabhi and knew that he had business dealings with her husband. She stated that one day in February 1983 she went to her husband's store to bring him lunch, which was customary for her to do. While there she heard Mesbah speaking to Sabhi in Arabic. Mesbah told Sabhi that Fryda was suing

Mesbah for divorce, that everything was "tied up," and that Mesbah said that he was "going to screw [Fryda] up" because he was "not going to give her anything, and that [he was] going to transfer everything to [his] brothers."

Fryda testified that she was able to understand two people speaking to each other in Arabic. She further stated that the conversation took place on or about February 10, 1983, the date upon which the trial court entered its order which enjoined Mesbah from selling any of his real estate.

According to Sabhi, he knew nothing of the February 10th order and nothing of the divorce proceeding. He stated that on February 10th he was in the Middle East and that he returned to the United States on or about February 25, 1983.

Sabhi stated that a few days after his return, he learned from a friend that Mesbah was going to sell his interest in the premises at issue to the friend. Sabhi expressed to the friend his desire to purchase the building. The friend responded that Mesbah had told the friend that Mesbah would not sell the property to Sabhi.

Sabhi stated that he had not talked to his brother in 2½ years. He met with Mesbah at some point and offered to buy the building in installments. The value of the building was $80,000, and it was encumbered by a $50,000 mortgage. Sabhi agreed to assume the mortgage and to pay Mesbah $30,000 in installments. Although they did not specify the amounts of these installments because, as brothers, they understood that Sabhi would pay Mesbah when he

was able. Sabhi gave Mesbah a check for $2,750 on March 5, 1983 which was admitted into evidence. He stated that it was a deposit on his purchase of the interest in the assignment.

Later Mesbah refused to sign documents of assignment until Sabhi paid him more money. Sabhi offered to pay Mesbah with merchandise rather than money, and Mesbah agreed. A document admitted into evidence indicated a listing of several kinds of merchandise in various amounts, the values thereof, and a total value of $7,254.28. The document contains no names, dates, signatures, or references to the assignment or any other form of transaction.

The assignment, also admitted into evidence, was dated April 20, 1983. In it Mesbah assigned to Sabhi his

interest in an Articles of Agreement for Trustee's Deed, dated November 23, 1982, wherein Devon Bank as trustee under Trust Agreement No. 3972 was seller and "Misbah Chihade" (sic) was the purchaser of property located at 2867 N. Milwaukee in Chicago. Also admitted into evidence was the consent to and agreement of the sole beneficiary of the land trust to the assignment from Mesbah to Sabhi. This document was dated May 19, 1983.

Sabhi testified that he later made the following payments to Mesbah, as indicated. On June 6, 1983, he gave Mesbah a check for $6,000. He stated that Mesbah told him to put the check in the name of their nephew because Mesbah owed the nephew money. Sabhi placed the nephew's name on the check. In December, 1983, Sabhi had a cashier's

check made payable to Mesbah for $3,367.72. In January, 1984, Sabhi had another cashier's check made payable to Sabri for $2,528.00.

In September, 1983, Mesbah asked Sabhi for more money, because, Mesbah said, he was going "on vacation". Sabhi gave Mesbah a check for $5,000 but told him to hold it until Sabhi had sufficient funds to cover the check. Sabhi testified that Mesbah gave the check to their nephew, who attempted to cash the check but could not because there were insufficient funds in the account.

Two weeks later, Sabhi paid the nephew $2,000 by check. He paid the balance of $3,000 three weeks later, in cash.

In April, 1984, Sabhi sent a cashier's check for $1,000 to Mesbah. In May he

sent two more cashier's checks for $1,000 each to Mesbah. All of these were sent to Mesbah in Jerusalem.

The nephew of Mesbah and Sabhi testified that Mesbah had owed him $20,000, all of which had been repaid by the time of the hearing. He testified that payment was made with $7,000 worth of general merchandise, a check in the amount of $6,000, and the monies paid to him by Sabhi in lieu of the $5,000 check not covered by sufficient funds.

The nephew stated that he had brought the $20,000 from the Middle East when he came to the United States, apparently in approximately 1980. He stated that he kept the money in a safe rather than a bank. He testified that he loaned the money to Mesbah in 1981. He also stated that from 1980

to 1983 he worked for his uncle Yusef, earning roughly $300 per week. In July 1983 Sabhi opened his own business of selling clothing; apparently part of his inventory was comprised of merchandise given to him by Mesbah.

Based on the evidence and testimony of Fryda, Sabhi, and the nephew of Sabhi and Mesbah, as well as the arguments of counsel, the court entered its order on May 8th which granted Fryda's petition. The court's order provided that: (1) Sabhi and the Devon Bank were named as respondents in the cause; (2) a rule was entered against Mesbah instanter, who was found in contempt of court; (3) the assignment of April 20, 1983 from Mesbah to Sabhi was held to be null and void and of no legal effect whatsoever; and (4) Sabhi was to forthwith account to Fryda for all rents collected

by him or for him by reason of his pretended ownership of said property.

Sabhi subsequently filed a motion to vacate this order, which the trial court denied. Sabhi's timely appeal followed.

OPINION:

I.

Sabhi argues first that the trial court's judgment should be reversed because there was no evidence that the assignment was made collusively with the intent that Mesbah would retain true title to and ownership of the property.

Generally, a spouse has an absolute right to dispose of his or her property in any manner and without the concurrence of the other spouse. (Johnson v. LaFrange State Bank (1978), 73 Ill.2d 342, 357, 383 N.E.2d 185; Payne v. River Forest State Bank & Trust Co. (1980), 81 Ill.

App.3d 1128, 1130, 401 N.E.2d 1229.) Such disposition of property is permissible even where its sole purpose is to minimize or defeat the statutory marital interest the other spouse may have in the property conveyed. (Hofmann v. Hofmann, (1983), 34 Ill.2d 205, 221, 446 N.E.2d 499; Lesnik v. Estate of Lesnik (1980), 82 Ill.App.3d 1102, 1105, 403 N.E.2d 683.) Nevertheless, where a conveyance from a spouse to a third party is essentially nothing more than a sham transaction, it is tantamount to a fraud and subject to defeasance by the other spouse. Hofmann v. Hofmann, (1983), 94 Ill.2d 205, 221, 446 N.E.2d 499; In re Estate of Nemecek (1980), 85 Ill.App.3d 881, 883, 407 N.E.2d 655.

A sham transfer of property is one which is either "colorable" or "illusory,"

such that the transferor had no intent to convey any present interest in the property, but, in fact, intended to retain complete ownership. (Johnson v. LaGrange State Bank (1978), 73 Ill. 2d 342, 359, 383 N.E.2d 185; O'Neill v. DeLaney (1980), 92 Ill.App.3d 292, 298-99, 415 N.E.2d 1260.) "An illusory transfer is one which takes back all that it gives, while a colorable transfer is one which appears absolute on its face but due to some secret or tacit understanding between the transferor and the transferee the transfer is, in fact, not a transfer because the parties intended that ownership be retained by the transferor. [Citation.]" (Johnson v. LaGrange State Bank (1978), 73 Ill.2d 342, 359, 383 N.E.2d 185.

In order to establish that a transfer of property amounted to a fraud subject

to defeasance, the complaining spouse must prove such allegations by clear and convincing evidence. (Hofmann v. Hofmann, (1983), 34 Ill.2d 205, 222, 446 N.E.2d 499; In Re Marriage of Glessner (1983), 119 Ill.App.3d 306, 315, 456 N.E.2d 311. The determination of whether the conveyance at issue was fraudulent depends upon all of the circumstances surrounding the transfer. O'Neill v. DeLaney (1980), 92 Ill.App.3d 292, 299, 415 N.E.2d 1260.

In the case at bar, the trial court found that Mesbah's assignment of his interest in the real estate purchase agreement to Sabhi was nothing more than a sham transaction designed to circumvent the court's prior order which restrained and enjoined Mesbah from conveying, transferring, selling, or assigning any of his property pending

final disposition of the dissolution action. Based upon all of the surrounding circumstances and the testimony of the witnesses at the court's hearing, the trial court essentially concluded that Mesbah had no intent to convey to Sabhi any present interest in the property, but instead planned to retain ownership in himself.

It is well settled that a trial court's determination in this regard will be set aside only if it is against the manifest weight of the evidence. (Vee See Construction Co., Inc. v. Luckett (1981), 102 Ill.App.3d 444, 447, 430 N.E.2d 91.) It is also long established that a court of review will not disturb a judgment where it is based upon an assessment of the credibility of the witnesses. (Economy Fire & Casualty Co. v. Warren (1979),

71 Ill.App.3d 625, 627, 390 N.E.2d 361.) Thus "[t]he credibility of the witnesses and the weight to be accorded to their testimony is a matter solely within the province of the trial court as trier of fact." Ross v. Steiner (1978), 66 Ill. App.3d 567, 574, 384 N.E.2d 398.

In order to conclude here that the assignment from Mesbah to Sabhi was a sham, the trial court discredited the testimony of Sabhi and his nephew as to the natures of and bases for the various monetary transfers between Mesbah, Sabhi, and their nephew. Thus the trial court correctly subjected the transaction to closer scrutiny since the transfer was between family members. (Hofmann v. Hofmann, (1983), 34 Ill.2d 205, 222-23, 446 N.E.2d 499.) Such close scrutiny was particularly

appropriate here, where the nephew, when questioned, "If you were asked to come and testify to something you will help him (the uncle), will you not," replied, "Of course. He is my family."

Without the testimony of Sabhi and his nephew, there was no clear proof that the payments from Sabhi to Mesbah were made in relation to Sabhi's purchase of Mesbah's interest in the property. In fact, in view of the admitted business dealing between them, the payments could have been made for any number of reasons wholly unrelated to the purported assignment.

In addition to this lack of proof as to the true nature of the payments between the brothers and their nephew, the record establishes other surrounding circumstances. First, Fryda testified that she heard Mesbah tell Sabhi that

he intended to "give" everything to his brothers in order to deprive Fryda of any interest therein. In addition, Mesbah subsequently left the country with the parties' only child and travelled to Jerusalem in direct violation of the court's order that temporary custody be in Fryda. Moreover, Sabhi knew of this, admitted that he knew of this, and in fact admitted that he sent some of his payments to Mesbah in Jerusalem.

Based upon all of the evidence produced at trial and the circumstances surrounding the assignment, the trial court reasonably could have found that the transfers of money between the brothers and the nephew were part and parcel of their collusive attempt to defraud Fryda of her interest and yet to smokescreen the intent that Mesbah

retain true ownership of the property. Accordingly, we cannot conclude that the trial court's judgment was against the manifest weight of the evidence.

II.

Sabhi argues in addition that even if there had been evidence of a collusive transfer, the trial court could have awarded only a marital property lien against the transferee's title; consequently, the trial court erred in invalidating the assignment.

A trial court judge in the domestic relations division possesses the jurisdiction to hear all issues which are justiciable in nature and are related to the dissolution of marriage proceeding. (In re Marriage of Pahlke (1983), 120 Ill.App. 3d 1009, 1014, 458 N.E.2d 1141; In re Marriage of Peshek (1980), 89 Ill.App.3d 959, 412 N.E.2d 698.)

Thus a judge may declare a transfer void when it is demonstrated that the conveyance was colorable or illusory. O'Neill v. DeLaney (1980), 92 Ill.App.3d 292, 298, 415 N.E.2d 1260.

The trial court here had full opportunity to declare the assignment from Mesbah to Sabhi void and of no legal effect. We note that Hofmann v. Hofmann, (1983), 34 Ill.2d 205, 446 N.E.2d 499, upon which Sabhi relies, does not dictate a contrary result. Hofmann involved a fraudulent forfeiture of the property in dispute and is consequently distinguishable from the facts here.

Sabhi also contends that Fryda could not claim any marital interest in the assignment at issue because no evidence was presented as to the percentage of marital property interest

to which Fryda would be entitled upon dissolution of the marriage. No showing to this effect was required, however, as Mesbah's interest was presumed to be marital property (Ill.Rev.Stat. 1983, ch. 40, par. 503(b)) in which both Mesbah and Fryda were presumed to have a species of common ownership which vested upon the commencement of the dissolution action and continued during its pendency (Ill.Rev.Stat. 1981. ch. 40, par. 503(c)) and which in any event was to be finally determined by the court at a later date. (See Ill. Rev.Stat. 1983, ch. 40, par. 501(d)(3); In re Marriage of Pahlke (1983), 120 Ill.App. 3d 1009, 1016, 458 N.E.2d 1141; In re Marriage of Zymali (1981), 94 Ill.App.3d 1145, 1148, 419 N.E.2d 487.) Consequently we find no basis for reversal of the trial court's

judgment.

Affirmed.

JOHNSON, J., concurs.

Presiding Justice Mel R. Jiganti dissenting:

A conveyance of real property can only be voided upon a showing of clear and convincing evidence that the transferor had no intent to convey any present interest in the property but, in fact, intended to retain complete ownership. (Hofmann v. Hofmann, (1983), 34 Ill.2d 205, 446 N.E.2d 499.) The setting aside of a conveyance is a harsh remedy in that it deprives one of the right of ownership of property, therefore, the burden is on the party attacking the conveyance to establish through clear and convincing evidence that the transfer was a sham.

Fryda's evidence at trial consisted

of her testimony that she overheard Mesbah stating that he wanted to "transfer" everything to Sabhi and leave her nothing. In her emergency petition for injunctive relief, she alleged that Mesbah was in the process of "selling" certain parcels of real estate acquired during the marriage in an attempt to deprive her of any marital rights she may have in the property.

This evidence, at best, merely shows that Mesbah may have intended to defeat any possible marital interest Fryda may have had in the property conveyed. However, as the majority correctly points out, Mesbah had the right to dispose of his property without the concurrence of Fryda even if the transfer may have been for the sole purpose of minimizing or defeating her marital rights in the property.

While it is true that conveyances among family members are subject to stricter scrutiny than arms-length transactions, the familial relationship alone does not raise the presumption that the conveyance was fraudulent. Sabhi testified that he agreed to buy the property from Mesbah for $80,000. The terms of the sale were that Sabhi was to assume the $50,000 mortgage on the property and pay the $30,000 balance to Mesbah in installments. The agreement was evidenced by a general assignment, signed by Mesbah and notarized by Sabhi's attorney, which shows that Mesbah transferred his interest in the property to Sabhi. Also admitted was a consent to the assignment signed by the sole beneficiary of the land trust to the assignment from Mesbah to Sabhi. Sabhi and his nephew, Sabri testified

to a number of payments made by Sabhi to either Mesbah, or upon the direction of Mesbah, to Sabri over several months amounting to approximately $30,000. Several cancelled checks were admitted into evidence which substantiated Sabhi's testimony that he paid Mesbah nearly $30,000 for the property. While the majority may speculate as to the purpose of these payments, Fryda did not present any evidence that would contradict or "discredit" the testimony of Sabhi and his nephew.

The facts that Mesbah fled the country with the couple's only son in violation of custody order and that Mesbah also violated court order restraining him from selling or transferring property pending the divorce action, are circumstances which do not establish clearly and convincingly that Mesbah

intended to retain ownership. Rather, the majority's recitation of these facts, in effect, unfairly penalizes Sabhi for his brother's misconduct and has no relevance to the issue of whether the transfer of property was a sham. In conclusion, the evidence Fryda produced at trial did not clearly and convincingly establish that the transaction was colorable or illusory and that Mesbah intended to retain ownership of the property. Accordingly, I would reverse the judgment.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NO. 84-1902

IN RE: THE MARRIAGE OF FRYDA SHEHADE,	)	Fourth Division May 23, 1985
Petitioner,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY
vs.	)	
MESBAH SHEHADE,	)	
Respondent.	)	HONORABLE AUBREY F. KAPLAN, PRESIDING.
FRYDA SHEHADE,	)	
Petitioner-Appellee,	)	
vs.	)	
SABHI CHEHADE,	)	
Respondent-Appellant.	)	

Presiding Justice MEL R. JIGANTI delivered the opinion of the court:

Fryda Shehade brought an action to dissolve her marriage with Mesbah Shehade. During the course of that proceeding, Mesbah's brother, Sabhi Chehade was made a party. Fryda sought to set aside a transaction transferring certain com-

mercial real estate owned by Mesbah to his brother Sabhi. The trial court found the transaction to be a sham thereby defrauding Fryda of her marital rights to the property and set the transaction aside. On appeal, Sabhi contends that there was no evidence supporting the finding that the transaction was a sham.

On October 13, 1982, Fryda filed a petition for dissolution. On November 23, 1982, Mesbah entered into an articles of agreement for a trustee's deed whereby the Devon Bank, as trustee, was the seller and Mesbah Shehade was the purchaser of real estate located at 2867 North Milwaukee in Chicago. The articles of agreement were not available to the trial court. On February 10, 1983, an order was entered restraining Mesbah and Fryda from transferring assets held jointly and individually by them.

On April 20, 1983, Mesbah signed a general assignment transferring his interest in the articles of agreement to his brother, Sabhi. Unaware of that transaction on November 16, 1983, the court entered an order restraining the trustee and Mesbah from assigning or otherwise conveying the property and ordered Fryda to collect the rental income from the property and apply it to the mortgage. After learning of the transfer to Sabhi, Fryda filed a petition on January 30, 1984 seeking to have the transfer set aside contending that the transaction was a fraud on her marital rights.

Sabhi first contends that the trial court erred in finding the transfer was a sham intended to defraud Fryda of potential marital rights in the property.

In Illinois, a property owner has

an absolute right to dispose of his or her property during the marriage without the concurrence of the other spouse even though the transfer may be for the sole purpose of minimizing or defeating the statutory marital interest the other spouse may have in the property conveyed. (Johnson v. LaGrange State Bank (1978), 73 Ill.2d 342, 357, 383 N.E.2d 185; O'Neill v. DeLaney (1980), 92 Ill.App. 3d 292, 298, 415 N.E.2d 1260.) This type of conveyance is not subject to defeasance by the other spouse unless the transaction is a sham and is "colorable" or "illusory" and is tantamount to a fraud. Hofmann v. Hofmann (1983), 94 Ill.2d 205 221, 446 N.E.2d 499; Johnson, 73 Ill.2d 342, 359, 383 N.E.2d 185; O'Neill, 92 Ill.App.3d 292, 298, 415 N.E.2d 1260.

The transaction is "colorable" or

"illusory" where a transferor in reality had no intent to convey any present interest in the property, but, in fact, intended to retain complete ownership. (Johnson, 73 Ill.2d 342, 359, 383 N.E.2d 185.) The determination of whether a transfer is real or fraudulent depends upon the circumstances surrounding the transfer. (O'Neill, 92 Ill.App.3d 292, 298, 415 N.E.2d 1260.) Where there is a transfer of real property, the transaction can be voided only upon a showing of clear and convincing evidence. Hofmann, 94 Ill. 2d 205, 222, 446 N.E.2d 499.

Fryda testified at trial that in February of 1983, she overheard a conversation between her husband and Sabhi at which time they talked about the pending action for marital dissolution and of her husband's intent to leave

her nothing and to transfer everything to his brother.

Sabhi testified that when he returned from the Middle East in February of 1983, he learned that Mesbah was going to sell his building to a friend. Sabhi stated that Mesbah agreed to sell the building to Sabhi. Sabhi stated that the purchase price they agreed upon was $80,000 and Sabhi was to assume the $50,000 mortgage on the property and pay the $30,000 balance in installments. He stated that as they were brothers they did not set the terms for the installment payments but that Sabhi would pay Mesbah when he had money. Sabhi offered into evidence a check dated March 5, 1983, payable to Mesbah, in the amount of $2750 which Sabhi said was a deposit on the property. Sabhi also stated that Mesbah wanted more

money before he would transfer his interest in the property to Sabhi. It was then that Sabhi gave Mesbah merchandise amounting to $7254, according to Sabhi's exhibit in evidence. Sabhi testified that they went to Sabhi's lawyer to sign papers to transfer the property to Sabhi. Sabhi then introduced into evidence a general assignment, dated April 20, 1983, signed by Mesbah and notarized by Sabhi's attorney, which shows that Mesbah transferred his interest in the property to Sabhi. He also presented into evidence a consent to the assignment, signed by the sole beneficiary to the land trust, Gani Islami, dated May 19, 1983 which states that the beneficiary consented to the transfer of Mesbah's interest in the articles of agreement to Sabhi.

Sabhi then testified to a number

of payments to Mesbah and presented several cancelled checks into evidence to substantiate those payments. On June 6, 1983, Sabhi gave Mesbah a check in the amount of $6000 payable at Mesbah's direction to their nephew, Sabri Shehade. In December, 1983, he gave Mesbah a cashier's check for $3367.72 and in January, 1984, he gave Mesbah a check for $2528.

Sabhi also stated that he gave Mesbah a check for $2000 and $3000 in cash. Further, he gave Mesbah three checks in the amount of $1000 each in April and May of 1984. These payments were not substantiated in the record.

Sabri Shehade, the brothers' nephew next testified that Mesbah had owed him $20,000 but that this amount had been paid at the time of trial. Of that sum, he stated that he received a

$6000 check from Sabhi, merchandise worth in excess of $7000 from Mesbah on April 15, 1983, a $2000 check and $3000 in cash from Sabhi.

We believe that there is insufficient evidence to support the finding by the trial court that the transaction here was merely colorable or illusory. While Mesbah and Sabhi are brothers and transfers between family members are subject to stricter scrutiny than normally accorded conveyances (Hofmann v. Hofmann (1983), 94 Ill.2d 205 222-223, 446 N.E.2d 499, citing 37 C.J.S. Fraudulent Conveyances §596, 251 (1943)), such transfers are not presumed fraudulent from the relationship alone. (Bremer v. Bremer (1952), 411 Ill. 454, 104 N.E.2d 299.) There was sufficient documentary evidence for the transfer from Mesbah to Sabhi. The evidence showed that Mesbah signed

a general assignment of his interest in the articles of agreement to Sabhi and that Sabhi paid approximately $30,000, of which only $8000 has no documentary support in the record. While Mesbah may have intended to defeat any possible marital interest Fryda may have had in the property through a conveyance to his brother, this type of conveyance is not subject to defeasance. Therefore, we conclude that the trial court erred in declaring the transfer to be void.

Accordingly, the judgment of the circuit court of Cook County is reversed.

JOHNSON and LINN, JJ. concur.

62746 ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

February 5, 1986

Mr. Albert Koretzky
DiMonte & Lizak
5201 N. Harlem Ave.
Chicago, IL 60656

No. 62746 - Fryda Shehade, respondent, v. Mesbah Shehade, respondent (Sabhi Chehade, petitioner). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petitition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 27, 1986.